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No. 88-1426

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

OMAHA INDIAN TRIBE,

Petitioner,

v.

HAROLD JACKSON, *et al.*,

Respondents.

OMAHA INDIAN TRIBE,

Petitioner,

v.

AGRICULTURAL ... WILSON, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Final Judgment of the district court in favor of Respondent State of Iowa should not be vacated and set aside, Respondent Iowa now having admitted Mr. Hultman's representation as Attorney General in litigation involving the "same area" of land prior to Mr. Hultman's forced representation, of Petitioner Tribe as United States Attorney in *United States v. Wilson*, in which Petitioner Tribe's interests were "sold out" for the benefit of Respondent Iowa?

Whether the Court of Appeals committed reversible error in violating Rule 15(b) by refusing to declare that the *sua sponte* pretrial order of April 5, 1976, should be amended to comport with the evidence in the record, all of which evidence pertained to the full 6390 acres of land in the Blackbird Bend Meander Lobe rather than constricting its decision to the fraudulent complaint in *United States v. Wilson*?

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MISCELLANEOUS

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Vol. 6, *Moore's Federal Practice*, Summary Judgment, [27]—Fraud, p. 56-498, *et seq. See*, also p. 56-691, *et seq.* 9

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Rule 15(b), Federal Rules of Civil Procedure 6-7

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Petitioner Omaha Indian Tribe seeks review of the Opinion of the United States Court of Appeals for the Eighth

Circuit,[1] and the Memorandum Opinion, dated January 13, 1984, of the United States District Court for the Northern District of Iowa[2] and the Final Judgment and Decree, dated May 9, 1987, as Amended June 30, 1987, unreported.[3]

JURISDICTION

The opinion of the Court of Appeals for the Eighth Circuit was rendered on August 12, 1988, the Order denying Petitioner Tribe's motion for rehearing *en banc* was entered November 10, 1988, and the period for filing was extended by the Court to and including February 28, 1989. The Court's jurisdiction is invoked pursuant to 28 U.S.C. Sec. 1254(1).

REPLY TO BRIEF IN OPPOSITION

The Solicitor General of the United States filed a Brief in Opposition to Petitioner Omaha Indian Tribe's request to be heard respecting issues vital to its very survival. Rather than fulfilling the responsibilities owing to the Court and to Petitioner Tribe, as an agent of the United States Trustee, the Solicitor General makes serious misstatements throughout that Brief in Opposition to which reply is made. That course of conduct constitutes a grave disservice to the Court by failing correctly to review the critical issues which were, in fact, tried on the merits in the district court. For example, the Solicitor General should have stated that the issues joined and fully tried pertained to the question of whether the Blackbird Bend Meander Lobe comprised of 6390 acres was accretions to the Iowa riparian bank, as contended by the private Respondents and

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[1] *Omaha Indian Tribe v. Jackson, et al.*; *Omaha Indian Tribe v. Wilson, et al.*, 854 F.2d 1089 (CA 8, 1988), Pet.App. Appendix C, p. 37a-48a.

[2] *United States v. Wilson*; *Omaha v. Jackson, et al.*; *Omaha v. Agricultural, et al.*, hereafter referred to as *Omaha v. Wilson*, 578 F.Supp. 1191 (U.S.D.C.N.D. Iowa W.D. 1984); Pet.App., Appendix A, p. 5a-36a.

[3] Pet.App., Appendix B, p. 16a. [*See* Pet., p. 2-3 for full review of reported decisions].

concerning which they had the burden of proof. Those documented and undeniable facts are summarized in the paragraphs which follow.

Reflective of those grave misstatements is the initial sentence in the Brief in Opposition which states:

> This litigation is a dispute over title to land within the original boundary of the Omaha Indian Reservation . . . [involving] the approximately 2900-acre peninsula . . . referred to in this litigation as the Barrett Survey Area.[4]

The "dispute" in the trial on the merits did *not* pertain to title to lands within the Barrett Meander Line but rather involved title to the full 6390 acres of the Blackbird Bend Meander Lobe, which totally encompassed the lands within the Barrett Meander Line. That Barrett Line was not a boundary but rather a transitory high water line of the Missouri River meandered—not surveyed—by Barrett in 1867 during the flood period of that year. The boundary of the Tribe's Reservation is well stated by the Court in these terms: "The eastern boundary of the Reservation was fixed as the center of the main channel of the Missouri River, the thalweg."[5] To be noted here is the fact that the Barrett Meander Line was far removed from the boundary of Tribe's Reservation. In OMAHA, I,[6] Plate I, there is displayed the substantial land area between the meander line and the "thalweg" of the Missouri River—the boundary of the Reservation—title to which, of necessity, is claimed by Petitioner Tribe as being part of Tribe's Reservation.

Additionally and of great importance due to the misstatements in the Brief in Opposition, the Court refers to the claim of the Respondents here in these terms:

> "Petitioners argued that the river had gradually eroded the reservation land on the west bank of

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[4] Opposition, p. 2-3.

[5] Pet.App., Appendix H, 107a, 114a.

[6] Pet.App., Appendix I, p. 135 a, 143a, Plate I.

> the river, and that the disputed land on the east bank, in Iowa, had formed by gradual accretion and belonged to the east-bank riparian owners."[7]

As a consequence, rather than the "dispute" being over the title to the land within the Barrett Meander Line, the issues pertained to the title of the lands extending far from the Barrett Meander Line to the Iowa riparian bank, encompassing 6390 acres. There is set forth below Plate II, which appears in Tribe's Petition, demarking "the east-bank riparian" land as distinguished from the land within the constricted Barrett Meander Line. As a consequence it was and is a gross injustice for the Court of Appeals

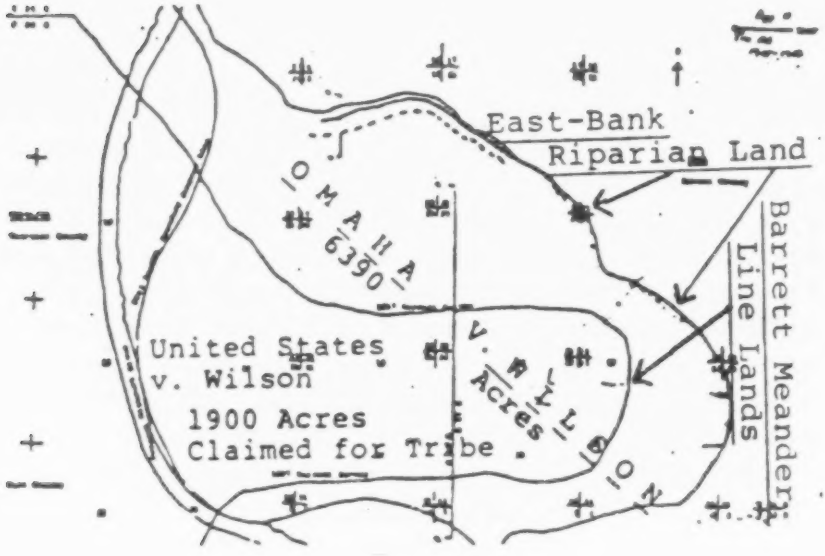

PLATE II

East-Bank Riparian Land Distinguished from Barrett Meander Line Lands

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[7] *Ibid.*, p. 115a.

in OMAHA IV, which is here for review, quoting from OMAHA III, to mandate that the Tribe has the unconscionable obligation of proving that the:

> . . . river moved westward over the eastern Barrett Survey land between 1867 and 1923 by avulsion.[8]

By that statement, the Court of Appeals in the OMAHA IV opinion—which Petitioner Tribe has asked to be reviewed—committed, it is believed, reversible error when it: (1) rejected the proof in the record in the trial on the merits comprised of evidence, received without objection, offered by Petitioner Tribe, Respondents, and indeed the Department of Justice respecting the full 6390 acres comprising the Blackbird Bend Meander Lobe—not the Barrett Meander Line land:[9] (2) imposed upon Petitioner Tribe—which had initiated its own case of *Omaha v. Wilson* and represented by counsel of its choice—the rejected and it is charged fraudulently constricted complaint in *United States v. Wilson* and the rejected representation of the Department of Justice attorneys;[10] (3) forced upon Petitioner Tribe the burden of proving an avulsion across and over the lands within the constricted Barrett Meander Line in disregard of the fact, as reviewed above, that the Missouri River was far removed from that illusory meander line which no longer existed;[11] and (4) forced Petitioner Tribe to retry the title to the lands *outside* of the Barrett Meander Line, irrespective of the fact, as will now be reviewed, that the decision of the district court in *Blackbird Bend I*, OMAHA I, and the Court's decision in *Wilson v. Omaha* were all predicated upon the trial on the merits pertaining to the lands both *within* and, of necessity, *outside* the Barrett Line up to the Iowa riparian bank, all as displayed on the Plate set forth above.

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[8] Pet.App., Appendix C, p. 37a, 40a, quoting from OMAHA III, Pet.App., Appendix G, p. 92a, 102a.

[9] Pet., p. 9, *et seq.*

[10] *Ibid.*, p. 6-9.

[11] *Ibid.*, p. 12-14.

RULE 15(b) MANDATES THE AMENDMENT OF THE PRETRIAL APRIL 15, 1976 *SUA SPONTE* ORDER PRECLUDING RETRIAL; THE PRINCIPLES OF *RES JUDICATA* ARE APPLICABLE

Further establishing the all-pervasive error in the Opposition, quoted *supra.*, p. 3, are these fully documented facts respecting the scope of the trial on the merits. Petitioner Omaha Indian Tribe in its quiet title action, *Omaha v. Wilson*, C 75-4067, claimed title to 6390 acres comprising the Blackbird Bend Meander Lobe;[12] Respondents Lakin, *et al.*, and Respondent Iowa denied Petitioner Tribe's title, claiming that: (a) the Blackbird Bend Meander Lobe was totally washed away; (b) totally replaced by accretions to the Iowa riparian bank; and (c) Respondents by mesne conveyances from the owners of the Iowa riparian bank held title to their respective claims in the 6390 acres.[13] In their Brief in Opposition, Respondent Wilson, *et al.*, reiterated their claims that their lands within the Blackbird Bend Meander Lobe were accretions to the Iowa riparian bank.[14] Respondent Iowa in its Opposition likewise asserted that the State and private defendants ". . . presented evidence that the river moved by accretion."[15] Predicated upon the evidence offered without objection among Petitioner Tribe and Respondents, the district court found as a fact, albeit clearly in error, that (1) Respondents proved that the Blackbird Bend was completely obliterated and (2) replaced by accretions to the Iowa riparian land and dismissed Petitioner Tribe's claim to the 6390 acres.[16]

The Court of Appeals in OMAHA I declared that the finding of the district court essential to Respondents' case—

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[12] Pet., p. 9, *et seq.*, Pet.App., Appendix O, p. 269a, 272a.

[13] Pet., p. 9, *et seq*; Pet. App., Appendix CC, p. 378, 379a-380a, para. 8. [Respondents Lakin, *et al.*, answers 376a identical as to counterclaims with R.G.P., Inc.,]

[14] Respondent Wilson's Brief in Opposition, p. 5, 2nd paragraph.

[15] Iowa's Opposition, p. 5.

[16] Pet.App., Appendix K., p. 205a, 241a-245a.

that the land comprising the Blackbird Bend Meander Lobe (including the land within the Barrett Meander Line) was accretions to the Iowa riparian bank—is "clearly erroneous and not supported by substantial evidence."[17]

The Court, in *Wilson v. Omaha*, further underscores the error in the Opposition by declaring that Respondents' claimed title was predicated upon the assertion that their lands were accretions to the Iowa riparian bank,[18] necessarily involving lands *outside* the Barrett Meander Line and extending to the Iowa riparian bank.

Seeking to avoid the undeniable fact that the title to the 6390 acres was the subject *res* in the trial on the merits, the Solicitor General's Brief in Opposition continues erroneously to state that Petitioner Tribe:

> . . . has participated fully in litigating title to the land within the Barrett Survey Area, and nothing in the present judgment prevents the Tribe from pursuing its remaining claims to the larger area outside the Barrett survey.[19]

The Solicitor General seeks to force Petitioner Tribe to retry issues already tried. It is urged to the Court that where, as here, the issues which were tried and which are necessary to the decision of the court, as here, the evidence in the record is controlling over both the pleadings and the *sua sponte* pretrial April 5, 1976 Order which purported to limit the litigation to the land area claimed by the Department of Justice in its constricted case of *United States v. Wilson*—the Barrett Meander Line.

Repeatedly the courts have declared, pursuant to Rule 15(b) of the Federal Rules of Civil Procedure, and the precedents uniformly hold that where, as here, issues which were not stated in a pretrial order, but evidence was never-

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[17] Pet.App., Appendix I, p. 135a, 167a.

[18] Pet.App., Appendix H, p. 107a, 115a; *see*, Plate II above.

[19] Opposition, p. 8.

theless offered without objection, the pretrial order is considered to have been amended to be in conformity with the proof offered in the trial on the merits.[20]

Reference is again made to Petitioner Tribe's analysis of the facts and law respecting the principles of *res judicata* which preclude Petitioner Tribe from being forced to retry the issue respecting title to the lands *outside* the Barrett Meander Line.[21] It is stressed that when an issue "of fact or law is actually litigated" which is essential to the judgment, those issues may not again be tried.[22] There is no question that the Court in *Wilson v. Omaha* could not have rendered its decision relative to the land within the Barrett Meander Line had the issue not been fully tried in regard to the lands outside the Barrett Meander Line extending to the Iowa riparian bank.[23]

RESPONDENTS IOWA'S ADMISSION OF HULTMAN'S PRIOR REPRESENTATION AFFIRMS PETITIONER TRIBE'S FRAUD CHARGES[24]

The admission by Respondent Iowa that Mr. Hultman had previously represented Respondent Iowa involving the

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[20] *Dean Foods Co. v. Albrecht Dairy Co.*, 396 F.2d 652 (CA 8, 1968); *Shelley v. Union Oil Co.*, 203 F.2d 808 (CA 9, 1956); *see* also *Vogrin v. Hedstrom*, 220 F.2d, 863 (CA 8, 1955) *cert.den.* 350 U.S. 845 (1955).

Moore has stressed that pretrial orders entered pursuant to Rule 16 of the Federal Rules of Civil Procedure should be read in light of Rule 15(b); Vol. 3, *Moore's Federal Practice* (Cumulative Supplement, 1988-89) "To Conform To Evidence R.15(b)," Sect. 15-13[1]. p. 15-119, *et seq*; In addition, *Moore* reviews in detail an abundance of authority which holds that pretrial orders are to be amended to conform with the evidence received into the record either by express agreement or implied approval based upon failure to object. In the Court's decision of *Brandon et al., v. Holt*, 469 U.S. 464, 471 (1985), there is reviewed in comprehensive detail the principle that the proof in the record is controlling over pleadings and pretrial orders. Vol. 6, *Federal Practice and Procedure*, Sec. 1491, p. 45.

[21] Pet., p. 23.

[22] *Ibid.*

[23] *Supra.*, Plate, p. 4.

[24] Respondent Iowa's Brief in Opposition, p. 13.

"same area" of land prior to forcing his representation upon Petitioner Tribe[25] and the district court's declaration that it had not and would not hear the fraud charges establish that Petitioner Tribe's fraud charges are not "frivolous and without merit."[26] Most assuredly Petitioner Tribe's motion for summary judgment establishing the forced, fraudulent representation by Mr. Hultman and other attorneys in the Department of Justice—supported by uncontroverted affidavits—was not "flawed."[27]

The Court is urged fully to consider the harsh refusal of the Court of Appeals to permit Petitioner Tribe to be heard on the fraud charges and its statement that it ". . . unequivocally determined prior to oral argument that it would not entertain this meritless issue"[28] constitute sound grounds for reversal due to the all-pervasive nature of the fraud which has now been substantially admitted.

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[25] Pet., p. 6-9; p. 18, *et seq.*

[26] Brief in Opposition, p. 8.

[27] Petitioner Tribe's motion for summary judgment is the proper vehicle to establish the fraud by the attorneys in the Department of Justice. *Moore*, predicated upon numerous decisions, makes this statement:

> Relief from fraud is as varied as the cunning and artifice that are productive of the fraud. An affirmative claim [for summary judgment] may be predicated upon fraud, as a claim for damages, for an accounting and damages . . . the impression of a trust, and other appropriate relief . . . .

Moore further stresses that:

> . . . in whatever manner the issue of fraud may appear in an action, the general basic principles underlying summary judgment apply and, if these are met, the issue of fraud may be summarily adjudicated . . . .

Vol. 6, *Moore's Federal Practice*, Summary Judgment, [27]—Fraud, p. 56-498, *et seq. See*, also p. 56-691, *et seq.*; Vol. 7, *Moore's Federal Practice*, "For Fraud Upon the Court," p. 60-351, *et seq.*; Vol. 10A, *Federal Practice & Procedure*, Sec. 2737, p. 453, *et seq.*; in which there is reviewed in detail the cases in which Rule 56 of the Federal Rules of Civil Procedure has been utilized, as here, to bring a court's attention by a motion for summary judgment to a critical but ancillary issue.

[28] Pet.App., Appendix C, p. 37a, 40a, n. 4; *see*, Respondent Iowa's Brief in Opposition, p. 13.

FAILURE TO ENTER FINDINGS VIOLATES RULE 52(a)

The Solicitor General supports the Court of Appeals[29] which violated Rule 52(a) when it sustained the district court's refusal to enter findings. There is no authority permitting the Court of Appeals to substitute for findings an alleged "prior scrutiny" of the record allegedly made by the district court and the Court of Appeals of the comprehensive proof in the record.[30] Let it again be stressed that the Court of Appeals, in grave error, was "scrutinizing" the record on the basis of the misconception that the trial on the merits was limited to the lands within the Barrett Survey Line.[31]

PETITIONER TRIBE'S RIGHT TO REGISTRY FUND

As part of the forced fraudulent representation which has so devastated Petitioner Tribe, the Solicitor General supports the Court of Appeals' authorization of the unconscionable seizure of Petitioner Tribe's profits from its farming operations by the Department of Justice to pay for alleged improvements.[32]

Respectfully submitted,

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[29] Opposition, p. 9-10; para. c.

[30] Pet.App., Appendix C, p. 37a, 42a-44a.

[31] For imperative requirement of findings, *see, United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948); Vol. 5A, *Moore's Federal Practice*, Rule 52.03[3], "Findings that are induced by an erroneous view of the law are not binding. Nor are findings that combined both fact and law, when there is error as to the law."

[32] Pet., p. 26-28, commentary and citations.